Licvem Shipping & Trading Aps & Anor v JLM Logistics (M) Sdn Bhd & Ors

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 22NCVC-405–08 OF 2014
WAN AHMAD FARID JC
31 MARCH 2016

Civil Procedure — Affidavit — Admissibility — Whether solicitor could depose affidavit on behalf of client — Whether solicitor authorised to depose affidavit — Whether facts to be deposed contentious — Undated affidavit — Whether undated affidavit could be referred to by court in reaching its decision — Whether leave of court had been obtained

Civil Procedure — Case management — Pre-trial discovery — Plaintiffs' application for discovery — Whether documents sought far too wide — Whether documents relevant and related to factual issues — Whether application premature — Defendants' application for discovery — Whether documents relevant to determination of proceedings — Whether plaintiffs were in possession of documents — Whether discovery applications should be allowed

The plaintiffs claimed that the second, third and fourth defendants, who were the directors and shareholders of the first defendant company, had acted to the detriment of the plaintiffs. According to the plaintiffs the defendants had approached the plaintiffs' client, AEL (Mauritius) Ltd ('AEL'), to urge AEL to award a contract to the first defendant. The plaintiffs thus filed a suit against the defendants for, inter alia, breach of contract, breach of fiduciary duty, defamation, fraud and tort of unlawful interference with business and trade of the plaintiffs. In their defence, the defendants claimed that the contract acquired from AEL was obtained through a proper bidding process. The defendants also denied having committed any misconduct as alleged by the plaintiffs. The plaintiffs filed the present application ('encl 114') for the discovery of documents, which were allegedly in the possession of the defendants. The documents sought to be discovered included, inter alia, the contract between AEL and the first defendant, all invoices and bills in respect of the contract between AEL and the first defendant and accounts and bank statements related to payments made under the contract between the first defendant and AEL. The defendants claimed that they had already furnished the plaintiffs with the contract between AEL and the first defendant but objected to having to provide all invoices and bills as well as accounts and bank statements related to payments made under the contract between the first defendant and AEL. The defendants argued that encl 114 ought to be

dismissed on the grounds that it was a blatant abuse of the process and the documents sought were not crucial for the eventual determination of the trial. In the meantime, the defendants also filed an application ('encl 126') for the discovery of documents that were specifically pleaded by the plaintiffs in their statement of claim. The plaintiffs objected to encl 126 by way of an affidavit in reply filed by the plaintiffs' solicitor and a further undated affidavit filed by the first plaintiff. This judgment was in respect of the two separate applications for the discovery of documents under O 24 of the Rules of Court 2012 ('the ROC').

Held, allowing the defendants' application for discovery with costs in the cause and dismissing the plaintiffs' application for discovery:

(1) Although this court had a discretionary power to order the discovery of any document at any stage of the proceedings, the documents sought to be discovered should not be far too wide but relevant and related to the factual issues. In the instant case, the plaintiffs' application seeking discovery of all bank accounts and all statements of account of the first defendant was far too wide and wholly inappropriate. For this reason alone, encl 114 ought to be dismissed (see paras 15–16).

(2) Further O 24 r 10 of the ROC required the documents sought for in a discovery application to have been referred to in the pleadings and for the documents to be crucial for the determination of the case. In the present case, the documents sought by the plaintiffs were only for the assessment of damages in the event the plaintiffs succeeded in their action. As such, the application was premature, since the question of liability had not been decided as yet. In any case, since the discovery application could be made at any stage of the proceedings, the plaintiffs could always make a similar application at the assessment stage in the event that they succeeded later (see para 19).

(3) As the plaintiffs objected to encl 126 by way of an affidavit in reply filed by the plaintiffs' solicitor, it became necessary to consider whether a solicitor could depose an affidavit on behalf of his client. There was nothing in the solicitor's affidavit that specifically stated that the deponent solicitor was expressly authorised by the plaintiffs to depose the affidavit on their behalf. Further, the said affidavit had descended into contentious factual matters that involved such assertions that certain documents were private and confidential and were privileged from disclosure. It was settled law that in such circumstances a solicitor could not depose an affidavit on behalf of his client. Therefore, the affidavit in reply filed by the plaintiffs' solicitor ought to be disregarded (see paras 25–28).

(4) The first plaintiff's affidavit objecting to encl 126 was undated. Although the plaintiffs relied on O 2 r 3 of the ROC and urged this court to exercise

its discretion to admit the affidavit, there was no need to resort to O 2 r 3 of the ROC. Instead the remedy was to be found in O 41 r 9(2) of the ROC, which provided that the plaintiffs only needed to ask the leave of the court to use the same. However, as there was no such application for leave, the said affidavit was rejected (see paras 29–30).

(5) Deprived of the two affidavits in reply to encl 126, it was clear that the defendants' discovery application was, inter alia, relevant to the determination of the proceedings and also that the plaintiffs were in possession of the documents, as was obvious from the plaintiffs own admission in the statement of claim (see para 31).

[Bahasa Malaysia summary

Plaintif-plaintif mendakwa defendan kedua, ketiga dan keempat, yang merupakan pengarah dan pemegang saham syarikat defendan pertama, telah bertindak merugikan pihak plaintif. Menurut plaintif-plaintif, defendan-defendan telah mendekati pelanggan plaintif-plaintif, AEL (Mauritius) Ltd ('AEL'), untuk menggesa AEL untuk mengawardkan kontrak kepada defendan pertama. Plaintif-plaintif dengan itu memfailkan saman terhadap defendan-defendan kerana, antara lainnya, melanggar kontrak, kewajipan fidusiari, fitnah, penipuan dan tort gangguan menyalahi undang-undang dengan perniagaan dan perdagangan plaintif-plaintif. Dalam pembelaan mereka, defendan-defendan mendakwa bahawa kontrak yang diperolehi daripada AEL telah diperoleh melalui proses pembidaan yang sepatutnya. Defendan-defendan juga menafikan melakukan apa-apa salah laku seperti yang didakwa oleh pihak plaintif. Plaintif-plaintif memfailkan permohonan ini ('lampiran 114') untuk penemuaan dokumen, yang didakwa dalam milikan defendan-defendan. Dokumen-dokumen yang dituntut untuk ditemui termasuklah antara lain kontrak di antara AEL dan defendan pertama, semua invois dan bil-bil berhubung kontrak antara AEL dan defendan pertama dan akaun dan penyata bank yang berkaitan dengan pembayaran yang dibuat di bawah kontrak di antara defendan pertama dan AEL. Defendan-defendan mendakwa bahawa mereka telah memberikan plaintif kontrak di antara AEL dan defendan pertama tetapi membantah perlu menyediakan semua invois dan bil serta akaun dan penyata bank yang berkaitan dengan pembayaran yang dibuat di bawah kontrak di antara defendan pertama dan AEL. Defendan berhujah bahawa lampiran 114 sepatutnya ditolak atas alasan bahawa lampiran tersebut adalah satu penyalahgunaan terang-terangan proses dan dokumen yang diminta adalah tidak penting untuk penentuan akhirnya perbicaraan. Sementara itu, defendan-defendan juga memfailkan permohonan ('lampiran 126') untuk mendapatkan dokumen yang diplid secara khusus oleh plaintif-plaintif dalam pernyataan tuntutan mereka. Plaintif-plaintif membantah lampiran 126 melalui afidavit balasan yang difailkan oleh peguam cara plaintif dan seterusnya afidavit tidak bertarikh yang difailkan oleh plaintif pertama. Penghakiman ini adalah berkenaan kedua-dua permohonan yang

berasingan untuk penemuaan dokumen di bawah A 24 Kaedah-Kaedah Mahkamah 2012 ('KKM'). A

Diputuskan, membenarkan permohonan defendan untuk penemuaan dengan kos dalam kausa dan menolak permohonan plaintif untuk penemuaan: B

(1) Walaupun mahkamah ini mempunyai kuasa budi bicara untuk memerintahkan penemuaan apa-apa dokumen pada mana-mana peringkat prosiding, dokumen-dokumen yang dituntut untuk ditemui tidak boleh terlalu meluas tetapi relevan dan berkait dengan isu-isu fakta. Dalam kes ini, permohonan plaintif-plaintif menuntut penemuaan semua akaun bank dan penyata akaun defendan pertama adalah terlalu luas dan secara keseluruhannya tidak sesuai. Berdasarkan alasan ini sahaja, lampiran 114 seharusnya ditolak (lihat perenggan 15–16). C

(2) Seterusnya, A 24 k 10 KKM memerlukan dokumen yang dituntut dalam permohonan penemuaan dirujuk dalam pliding-pliding dan dokumen-dokumen adalah amat penting untuk penentuan kes tersebut. Dalam kes ini, dokumen-dokumen yang dituntut oleh plaintif hanya untuk penilaian ganti rugi sekiranya plaintif berjaya dalam tindakan mereka. Oleh itu, permohonan tersebut adalah pramatang, kerana persoalan liabiliti masih belum diputuskan lagi. Dalam mana-mana kes, memandangkan permohonan penemuaan tersebut boleh dibuat pada mana-mana peringkat prosiding, plaintif-plaintif sentiasa boleh membuat permohonan yang sama pada peringkat penilaian sekiranya mereka berjaya kemudian (lihat perenggan 19). D E F

(3) Memandangkan plaintif-plaintif membantah lampiran 126 melalui afidavit balasan yang difailkan oleh peguam plaintif, adalah perlu untuk menentukan sama ada seorang peguam cara boleh mendeposkan afidavit bagi pihak anak guamnya. Tiada apa dalam afidavit peguam cara yang secara khusus menyatakan bahawa peguam cara deponen dibenarkan dengan nyata oleh plaintif untuk mendeposkan afidavit bagi pihak mereka. Selanjutnya, afidavit tersebut telah turun ke dalam perkara-perkara fakta perbalahan yang melibatkan dakwaan bahawa dokumen-dokumen tertentu adalah peribadi dan rahsia dan dilindungi daripada penzahiran. Adalah undang-undang terpakai bahawa dalam keadaan tersebut peguam cara tidak boleh mendeposkan afidavit bagi pihak anak guamnya. Oleh itu, afidavit balasan yang difailkan oleh peguam cara plaintif tidak sepatutnya diambil kira (lihat perenggan 25–28). G H

(4) Afidavit plaintif pertama membantah lampiran 126 adalah tidak bertarikh. Walaupun plaintif bergantung kepada A 2 k 3 KKM dan menggesa mahkamah ini untuk menggunakan budi bicaranya untuk menerima afidavit tersebut, tidak perlu mengambil jalan keluar kepada A 2 k 3 KKM. Sebaliknya remedi yang didapati dalam A 41 k 9(2) KKM, I

memperuntukkan bahawa plaintif-plaintif hanya perlu meminta kebenaran mahkamah untuk menggunakannya. Walau bagaimanapun, memandangkan tiada permohonan untuk kebenaran, afidavit tersebut telah ditolak (lihat perenggan 29–30).

(5) Akibat kekurangan kedua-dua afidavit balasan kepada lampiran 126, adalah jelas bahawa permohonan penemuaan defendan adalah antara lain relevan kepada penentuan prosiding tersebut dan juga bahawa plaintif-plaintif memiliki dokumen-dokumen yang jelas daripada kemasukan pengakuan plaintif sendiri dalam pernyataan tuntutan (lihat perenggan 31).]

Notes

For a case on admissibility, see 2(1) *Mallal's Digest* (5th Ed, 2015) para 408. For cases on case management in general, see 2(1) *Mallal's Digest* (5th Ed, 2015) paras 2087–2104.

Cases referred to

MBF Capital Bhd & Anor v Tommy Thomas & Anor [1997] MLJU 481, HC (refd)

Malayan Banking Bhd v Charterefield Corp Sdn Bhd [2001] 3 MLJ 160; [2001] 2 MLRH 646, HC (folld)

Rotta Research Laboratorium SpA & Anor v Ho Tack Sien & Ors [2010] 8 MLJ 733; [2010] 10 CLJ 491, HC (refd)

Wong Hou Lianq & Anor v Wong Kie Yik & Ors [2015] MLJU 358, HC (refd)

Legislation referred to

Rules of Court 2012 O 2 r 3, O 24, O 24 r 10, O 41 r 9(2), Form 41

N Ramesh (Eric Yap & Assoc) for the plaintiffs.
R Rishi (Rishi & Partners) for the defendants.

Wan Ahmad Farid JC:

[1] Before me, there are two separate applications (encls 114 and 126) for discovery of documents under O 24 of the Rules of Court 2012 ('the ROC').

FACTS

[2] This is a claim by the plaintiffs against the first, second, third and fourth defendants ('the main defendants') for a range of causes of action that, inter alia, include breach of contract, breach of fiduciary duty, defamation, fraud, tort of inducement of breach of contract, conspiracy, tort of unlawful interference with business and trade of the plaintiff's company.

[3] It was alleged that, the main defendants, who are the directors and shareholders of the first defendant, had contacted the plaintiffs' client, one AEL (Mauritius) Ltd ('AEL Mauritius') that the second, third and fourth defendants were forming a new company (culminating into the establishment of the first defendant) and urged AEL Mauritius to award the first defendant with the contract to the detriment of the plaintiffs.

[4] In their defence, the main defendants categorically denied that they were in breach of contract, fiduciary duty or otherwise involved in other allegations in the statement of claim and further stated that whatever contract that they acquired from AEL Mauritius was obtained through a proper bidding process.

ENCLOSURE 114 (APPLICATION BY THE PLAINTIFFS)

[5] This is an application by the plaintiffs and the fifth defendant for an order that the main defendants to give discovery by making and serving on the applicant, a list of documents which are in their possession, custody or power.

[6] The documents sought to be discovered by the applicants, inter alia, are the business documents in respect of the bank accounts, invoices, bills and other related documents concerning an agreement between AEL (Mauritius) and the first defendant.

[7] Counsel for the plaintiffs and the fifth defendant submitted that the application before me ('encl 114') is premised on the plaintiffs' claim for the loss of profits, general and special damages and punitive damages.

[8] The application was basically made for two reasons:

(a) the documents listed for the purpose of discovery of which the plaintiffs and the fifth defendant had no access that would be necessary for the purpose of the assessment of damages; and

(b) the documents are also relevant in the issue of liability of the first, second, third and fourth defendants.

[9] In their notice to produce under O 24 r 10 of the ROC (Form 41), the plaintiffs and the fifth defendant had specifically referred to:

(i) the contract between AEL Mauritius and with the first defendant;

(ii) the letter dated 9 October 2010 issued by the second, third and fourth defendants;

(iii) invoices and bills in respect of the contract between the first defendant and AEL Mauritius; and

(iv) account and bank statements related to payments made under the contract between the first defendant and AEL Mauritius.

[10] In his affidavit in reply, the third defendant who deposed the affidavit on his behalf and on behalf of the first, second and fourth defendants, averred that they had furnished the plaintiffs and the fifth defendant with documents (i) and (ii).

[11] But the third defendant averred in his affidavit in reply that the main defendants took exception to documents (iii) and (iv) because they were neither pleaded nor specifically referred to in the pleadings especially in the defence and counterclaim.

[12] Counsel for the main defendants then submitted that the application ('encl 114') ought to be dismissed for the following reasons:

(a) the application is a fishing expedition and a blatant abuse of the process;

(b) the documents sought are not necessary or otherwise crucial for the purpose and eventual determination of the trial; and

(c) the plaintiffs did not comply with the proper procedure under O 24.

[13] In respect to the first reason, counsel for the main defendants submitted that the plaintiffs had sought for all business documents, bank accounts, bills, agreements and all the documents relating the agreement between the first defendant and AEL Mauritius.

[14] The documents sought according to learned counsel are of uncertain width, description and identity. In my considered opinion, in order to succeed in this application, the plaintiffs must satisfy the court that: (a) the document had been identified specifically; (b) it was relevant to the plaintiffs case; and (c) it was in the possession of the defendant; *Rotta Research Laboratorium SpA & Anor v Ho Tack Sien & Ors* [2010] 8 MLJ 733; [2010] 10 CLJ 491.

[15] Although I am mindful that this court has a discretionary power to order the discovery of any document at any stage of the proceedings, the documents sought cannot be far too wide and further it has to be relevant and related to the factual issues. In the instant case, to seek for the discovery of documents in respect of all bank accounts and all statements of account of the first defendant, in my considered opinion, is far too wide and wholly inappropriate. For this reason alone, the application ought to be dismissed; see *Wong Hou Lianq & Anor v Wong Kie Yik & Ors* [2015] MLJU 358.

[16] In *Wong Hou Lianq* it was held that granting such a wide order for discovery without determining the type and nature of the documents, apart from a fishing expedition by the plaintiffs, is detrimental as even documents which are wholly irrelevant to the said action would be subject to the open ended order for discovery which will lead to further delay and expenses on the disposal of the said action.

[17] For the purpose of completeness, I will address the second and third reasons briefly. It is also submitted that the documents sought for were never pleaded. The affidavit in support of the application referred to para 8.6 of the statement of defence.

Para 8.6 of the statement of defence is produced herein:

> 8.6 The 2nd to 4th defendants are that AEL Mauritius entered into the contract with the 1st defendant referred to in paragraph 18 of the Claim after the lapsing of the SLA and after AEL Mauritius had made it evident that it was no longer desirous of the 2nd plaintiff exploiting the said warehousing business. The award of the contract was made in a bona fide manner and in furtherance of a bidding process.

[18] There was nothing in para 8.6 of the statement of defence that referred to any bank accounts, invoices or bills.

[19] Form 41 issued by the plaintiffs specifically referred to O 24 r 10 (see exh 'EYBO-1' of encl 115) which requires that the documents sought for in a discovery application must have been referred to in the pleadings and more importantly it is has to be crucial for the determination of the case. It appears to me that the documents sought are only for the assessment damages in the event that the plaintiffs succeed in this action. It is therefore premature since the question of liability has not been decided yet. In any case, the discovery application can be made at any stage of the proceedings, and the plaintiffs can always make a similar application at the assessment stage in the event that they succeed later.

[20] For the reasons given, I hereby dismiss the application with costs in the cause.

ENCLOSURE 126 (APPLICATION BY THE MAIN DEFENDANTS)

[21] Enclosure 126 is an application by the main defendants for the discovery of documents which are detailed as follows:

> 1.1 dokumen-dokumen berkenaan kewujudan persetujuan di antara pihak-pihak yang mana kesemua pembayaran untuk kerja-kerja Kontrak SLA di antara AEL Mauritius Limited ('AEL') Mauritius

dengan Defendan Kelima yang bertarikh 1.10.2012, akan dibuat kepada Plaintif Pertama, sepertimana yang diplidkan pada perenggan 7 Pernyataan Tuntutan di sini;

1.2 invois-invois yang diisukan oleh Plaintif Pertama menurut dan/atau berkenaan Kontrak SLA di antara AEL Mauritius dengan Defendan Kelima yang bertarikh 1.10.2012, sepertimana yang diplidkan pada perenggan 7 Pernyataan Tuntutan di sini;

1.3 resit-resit yang diterima oleh Plaintif Pertama menurut dan/atau berkenaan Kontrak SLA di antara AEL Mauritius dengan Defendan Kelima yang bertarikh 1.10.2012, sepertimana yang diplidkan pada perenggan 7 Pernyataan Tuntutan di sini;

1.4 dokumen-dokumen yang menunjukkan rekod-rekod pembayaran untuk dan/atau berkenaan kesemua kerja-kerja yang dilaksanakan di bawah Kontrak SLA di antara AEL Mauritius Limited ('AEL') Mauritius dengan Defendan Kelima yang bertarikh 1.10.2012 yang dibayar kepada Plaintif Pertama;

1.5 kesemua kontrak-kontrak dan/atau surat-surat dan/atau dokumen-dokumen berkenaan pengurniaan Kontrak-Kontrak daripada AEL kepada Plaintif Pertama sepertimana yang diplidkan pada perenggan 9 Pernyataan Tuntutan di sini;

1.6 kesemua kontrak-kontrak dan/atau surat-surat dan/atau dokumen-dokumen berkenaan pembaharuan Kontra-Kontrak daripada AEL kepada Plaintif Pertama sepertimana yang diplidkan pada perenggan 9 Pernyataan Tuntutan di sini; dan

1.7 kesemua kontrak-kontrak dan/atau surat-surat dan/atau dokumen-dokumen berkenaan pembaharuan Kontra-Kontrak daripada AEL kepada Plaintif Pertama sepertimana yang yang diplidkan pada perenggan 9 Pernyataan Tuntutan di sini.

[22] The application was supported by the affidavit of the third defendant ('encl 133'). The plaintiffs opted to reply through the affidavit of their solicitor, Toh Harnniann ('encl 130') and a further undated affidavit in support by the first plaintiff ('encl 137').

[23] The documents referred to in the application are items that were specifically pleaded in paras 7, 9 and 10 of the statement of claim. In fact, it was the plaintiffs who said that 'all payments in respect of the contractual works will be made to the first plaintiff (para 7 of the statement of claim). Further in para 9 of the statement of claim, the plaintiffs averred that they would refer to the relevant agreement at the trial. It must also be put on record that in para 10 of the statement of claim, the plaintiffs relied on certain letters dated 30 September 2013 and 1 October 2013, the very letters that the main defendants sought for in this discovery application.

[24] In respect of the affidavits in reply, I have these observations to make. **A**

(i) Enclosure 130 affidavit in reply by Toh Harnniann

[25] Can a solicitor depose an affidavit on behalf of his client? In *Malayan Banking Bhd v Charterefield Corp Sdn Bhd* [2001] 3 MLJ 160; [2001] 2 MLRH 646 it was held that a solicitor may depose an affidavit on behalf of the litigant if the following conditions are fulfilled: **B**

(a) the facts to be deposed must not be contentious or disputed question of facts; **C**

(b) the facts to be deposed must be from his knowledge; and

(c) he is authorised to depose the affidavit by the litigant.

[26] There is nothing in encl 130 that specifically stated that the deponent solicitor was expressly authorised by either the first or the second plaintiff or him to depose the affidavit on their behalf. He only affirmed that he deposed the affidavit on behalf of the plaintiffs and the fifth defendant, short of saying that he was authorised to do so. **D**

E

[27] Further, the said affidavit had descended into contentious factual matters that involved such assertions that certain documents are private and confidential and are privileged from disclosure. This is certainly, in my considered opinion, contentious matter of facts.

F

[28] On the authority of *Malayan Banking*, I therefore make a ruling to disregard encl 130.

(ii) Enclosure 137 undated affidavit in reply of second defendant

G

[29] Could an undated affidavit be referred to by this court in reaching its decision? Order 41 r 9(2) of the ROC provides that:

> (2) Every affidavit must be indorsed with a note showing on whose behalf it is filed and the dates of swearing and filing, and an affidavit which is not so indorsed may not be filed or used without the leave of the Court. **H**

[30] Learned counsel for the plaintiffs intimated to the court that 'for reasons unknown to us' the affidavit was not dated. Counsel then relied on O 2 r 3 of the ROC and urged this court to exercise its discretion to admit the affidavit. With respect, we do not have to resort to O 2 r 3. The remedy can be found in O 41 r 9(2) itself in that the plaintiffs only need to ask leave from the court to use the same. Unfortunately there was no such application for leave before me and I am therefore compelled to reject the said affidavit. In *MBF Capital Bhd* **I**

& Anor v Tommy Thomas & Anor [1997] MLJU 481 Kamalanathan Ratnam JC (as he then was) said:

> I have checked Enclosure 48 and I note that the said affidavit does not have the date and month when it was affirmed. This is a clear violation of O 41 r 9(2) of the RHC ... I am compelled to reject the said affidavit as no leave has been applied for, for the use of the same.

[31] Deprived of the two affidavits in reply to the application, I am left with the affidavit in support of the application ('encl 127') by the third defendant and from the submissions of both counsel from the Bar. In any case, it is my finding that the said application has fulfilled the three requirements stated in *Rotty Research* in that:

(a) the documents had been dated and pleaded;

(b) it was relevant to the determination of the proceedings; and

(c) by their own admission in the statement of claim, the plaintiffs are in possession of the same.

[32] In the circumstances, I hereby allow the application under encl 126 with costs in the cause.

Defendants' application for discovery allowed with costs in the cause and plaintiffs' application for discovery dismissed.

Reported by Kohila Nesan